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OFFICE OF PETITIONS

In re Application of
Donald R. Gilbreath :
Application No. 10/723,126 : DECISION ON
Filed: November 25, 2003 : PETITION
Attorney Docket No. C02-085A :
:

This is in response to the paper "PETITION", filed September 16, 2005, which is being treated as petitions to revive under 37 CFR 1.137(a) and 37 CFR 1.137(b).

The petition under 37 CFR 1.137(a) is DISMISSED.

The petition under 37 CFR 1.137(b) is GRANTED.

The above-identified application became abandoned for failure to timely file a reply to the non-final Office action mailed July 26, 2004. This Office action set a shortened statutory period for reply of three (3) months. No extensions of time under 37 CFR 1.136(a) were obtained. No reply having been received, the above-identified application became abandoned on October 27, 2004. A Notice of Abandonment was mailed on February 1, 2005.

Petition Under 37 CFR 1.137(a):

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the reply required to the outstanding Office action or notice, unless previously filed; (2) the petition fee set forth in 37 CFR 1.17(l); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(d). The instant petition lacks item (3).

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable: "The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."¹

Moreover, delay resulting from the lack of knowledge or improper application of the patent statutes, rules of practice or the Manual of Patent Examining Procedure, however, does not constitute "unavoidable" delay.²

Petitioner offers two explanations as to why the entire delay was unavoidable. According to petitioner, he had a overly burdensome workload. In addition, a lapse of communication occurred between petitioner and his assistant. However, petitioner has failed to explain why precisely his workload prevented him from treating the prosecution of the instant application as his "most important business". In addition, petitioner has failed to elaborate on the communication problem with his assistant.

Accordingly, the entire period of delay in the above-identified application can not be characterized as "unavoidable".

The petition fee required for a petition to revive is required for the filing, not merely the grant, of the petition.³ Accordingly, the \$500 petition fee has been charged to Deposit Account No. 07-0475, as authorized.

Petition Under 37 CFR 1.137(b):

A grantable petition under 37 CFR 1.137(b) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required by 37 CFR 1.137(d).

With the instant petition, petitioner paid the petition fee, submitted the required reply in the form of an amendment, and made a statement of unintentional delay. 37 CFR 1.137(b) (3) requires a statement that the entire delay in filing the required

¹ In re Mattulath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

² See Haines, 673 F. Supp. at 317, 5 U.S.P.Q. 2d at 1132; Vincent v. Mossinghoff, 230 U.S.P.Q. 621, 624 (D.D.C. 1985); Smith v. Diamond, 209 U.S.P.Q. 1091 (D.D.C. 1981); Potter v. Dann, 201 U.S.P.Q. 574 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (1891).

³ See MPEP 711.03(c) (II) (B).

reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. The statement contained in the instant petition varies from the language required by 37 CFR 1.137(b)(3). The statement contained in the instant petition is being construed as the statement required by 37 CFR 1.137(b)(3). Petitioner must notify the Office if this is not a correct interpretation of the statement contained in the instant petition.

The \$1500 petition fee has been charged to Deposit Account No. 07-0475, as authorized.

The application file is being forwarded to the Group Art Unit 3679 for examination.

Telephone inquiries related to this decision should be directed to the undersigned at 571-272-3207.

Cliff Congo

Cliff Congo
Petitions Attorney
Office of Petitions